IN THE HIGH COURT OF DELHI AT NEW DELHI

% Date of decision : November 13, 2007

OMP No.251/2007

Fertilizer Corporation of India Limited ..... Petitioner
! Through: Mr.Sushant Kumar and
Mr.Gaurav Sahah, Advocate.

Vs.

$ Haldor Topsoe A/S. .....Respondent
^ Through: Nemo.

CORAM :-

*** HON'BLE MR. JUSTICE ANIL KUMAR**

1. Whether reporters of Local papers may - be allowed to see the judgment?

2. To be referred to the reporter or not ?

3. Whether the judgment should be reported in the Digest?

ANIL KUMAR, J.(Oral)

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1. The petitioner has impugned the award dated 15th July, 2006 passed by the Arbitral Tribunal consisting of Hon'ble Mr. Justice H.L. Agrawal, Former Chief Justice of Orissa High Court, Hon'ble Mr. Justice J.K. Mehra, Former Judge of Delhi High Court and Mr.R.K. Pandey, Former Executive Director, Delhi Stock Exchange.

2. The petitioner is a government company as defined under the provisions of Section 617 of the Companies Act, 1956 and has its

manufacturing unit located at Sindri, District Dhanbad (Jharkhand) and is engaged in the business of manufacturing fertilizer, urea, ammonia, etc.

3. The contention of the petitioner is that the despite being declared a sick company by BIFR, it continued its business operation and entered into an agreement with respondent vide purchase order dated 18th October, 2000 for supply of S-200 Ammonia Converter Baskets. According to the petitioner, general conditions of purchase order contemplated that the time of delivery was the essence of the contract and was to be made by or before 1st July, 2001. It was agreed between the parties that 80% of the agreed price shall be paid by the petitioner to the respondent on the delivery of the said S-200 Ammonia Converter Baskets and balance 20% of the price was payable by the petitioner through a confirmed irrevocable letter of credit after successful test run and fulfillment of guarantee and payable against the submission of 'Acceptance Certificate'.

4. The respondent in order to secure the petitioner against performance of the Baskets and to secure that the Baskets were free from any mechanical defects, furnished two bank guarantees. According to the petitioner, the Baskets had to be installed before

1st July, 2001 whereas the respondent supplied the Baskets only on 3rd November, 2001 and on supply of Baskets, the petitioner released the payment of Euro 7,49,000 towards 80% of the total cost of the Baskets.

5. The grievance of the petitioner is that despite the receipt of Baskets, the respondent did not come forward for the installation of the Baskets and thus failed to comply with the obligation under which it was to be supplied before July 2001 and consequently the dispute arose and were referred to the Arbitral Tribunal.

6. The Arbitral Tribunal has awarded Euro 187,250 along with interest at 7% per annum from 1st April, 2003 up to the date of payment with the cost of the arbitral proceedings and the cost has been assessed at Rs.7.10 lakhs, the breakup of which was also given in the award.

7. The Arbitral Tribunal has considered the terms of payment, clause 5.2 regarding guarantee test run and clause 7 of Annexure-II of the commercial terms of the contract which contemplated that the delivery will be the essence of the contract and Ammonia Synthesis Converter Baskets S-200 will be delivered FOB within 10 months from the date of fax of intent.

8. The learned counsel for the petitioner has led emphasis on the fact that the petitioner was declared a sick company within the meaning of SICA by order passed by BIFR in Case No.515/92(II) of 1992 way back in 1992 and notification dated 10th September, 2002 was issued by the Ministry of Chemical and Fertilizers, Government of India, directing to close all the existing units of the petitioner and the award is in complete violation of the said notification. Great emphasis has also been led on the fact that the award is contrary to fundamental policy of India and interest of India and justice and morality and the petitioner cannot be held responsible for an act which has been committed without their attribution to the same.

9. The award is also impugned on the ground that the Arbitral Tribunal has held the petitioner liable for an act which has not been committed by them and the sole responsibility for non-performance of the contract is only attributable to the respondent.

10. The Arbitral Tribunal has considered that despite the petitioner being declared a sick company, the petitioner placed the purchase order on the respondent without knowledge or obtaining necessary orders from the BIFR. It was also held that despite pendency of the case before BIFR and appointment of operating

agency, contractual rights and obligation of the parties were neither suspended nor could be put in abeyance and there is no evidence to show that proceedings under SICA was disclosed to the respondent at the time of the entering into the contract.

11. Regarding the petitioner failing to perform their contractual obligation under purchase order dated 18th October, 2000, it was held that the guarantee test run was to be conducted within two months from the date of installation of the baskets and petitioner was obliged to take the guarantee test run preceded by installation and commissioning of the baskets with the technical support and supervision of the respondent. The Arbitral Tribunal has noted that the parties never contemplated at the time of entering into the contract that the petitioner would take more than six months to install the baskets. The reliance has also been placed on the statement of the witness, Shri A.K. Ghosh who clearly deposed that acceptance certificate could be issued only after installation of successful commissioning of the baskets and that the baskets were purchased for replacement of the existing baskets in the converter and new baskets were purchased primarily to enhance the capacity of the petitioner company. The said witness has also deposed categorically that there is no letter or document in the record calling upon the respondent company to supervise the installation

and commissioning of the baskets as pleaded by the petitioner or that no supervision work has been done by the respondent. Reliance has also been placed to a response to the question put to the witness that there was no moratorium of BIFR on subsisting contracts between the petitioner and the respondent company. Another witness of the respondent, Mr.D.K. Dutta, had stated that the respondent's obligation was to give technical/supervisory services for installing, erecting/commissioning of the new baskets which was not possible unless petitioner would have removed old catalyst and the old converter shell which was not done by the petitioner. Taking all these factors into consideration, the Arbitral Tribunal held that the petitioner failed and neglected to perform his obligation under the contract and not the respondent.

12. Regarding the mechanical warranty-cum-defect liability guarantee and performance guarantee ceased to have effect, it was held that performance guarantee, mechanical warranty/defect liability bank guarantee ceased to have any effect and this finding has not been challenged by the petitioner's counsel during the argument.

13. The Arbitral Tribunal has also considered the effect of BIFR proceeding on the contract for purchase of baskets and the fact

that Section 22 of SICA clearly lays down that only suits or proceedings for recovery of monies shall remain suspended and the arbitration was not a suit nor any proceeding for recovery for money was pending before the Court.

14. Examination of the pleas raised by the Council for the petitioner in view of the findings of the arbitrator cannot be said to be of such a nature which either shocks the conscience of the court or are contrary to law or the contract. The arbitrators have succinctly set out crucial issues and recorded findings in respect of them which findings, in my view, cannot be called perverse. The award is not contrary to any substantive provision of law or against the terms of the contract and therefore, there is no patent illegality.

15. In Hindustan Iron Co. V. K. Shashikant & Co., AIR 1987 SC 81, the Court held that the award of the Arbitrator ought not to be set aside for the reason that, in the opinion of the Court, the Arbitrator reached wrong conclusions or failed to appreciate the facts. This well settled proposition of law was reiterated in the decision of the Apex Court in Coimbatore District Podu Thozillar Sangam vs. Balasubramania Foundary & Ors., AIR 1987 SC 2045 where it has been opined that it is only an error of law and not a mistake of fact committed by the arbitrator which can be

adjudicated in the application/objection before the Court. If there is no legal proposition either in the award or in any document annexed with the award which is erroneous and the alleged mistakes or alleged errors, are only mistakes of fact and if the award is made fairly, after giving adequate opportunity to the parties to place their grievances in the manner provided by the arbitration agreement, the award is not amenable to corrections of the Court. In Hind Builders vs. Union of India, AIR 1990 SC 1340 the Court cautioned that where two views were possible it could not be predicated that there was an error apparent on the face of the award. In Bijendra Nath Srivastava vs. Mayank Srivastava & Ors. AIR 1994 SC 2562 the view expressed was that the reasonableness of reasons given by the arbitrator were not open to challenge and that the proper approach would be for the Court to support the award. Similarly, in Hindustan Construction Co. Ltd. vs. Governor of Orissa & Ors., AIR 1995 SC 2189 it was repeated that the Court cannot re-appreciate the material on the record. In the present facts and circumstances, it cannot be inferred that the award per se is preposterous or absurd. It is also no more res integra that the reasons vary in its conclusion according to idiosyncracy of the individual and the times and the circumstances in which he thinks. The Supreme Court in Gujrat Water Supply & Sewerage Board Vs Unique Erectors (Gujrat) P. Ltd and another,

AIR 1989 SC 973 in para 11 had observed:

> "11.....Reasonableness as such of an award unless the award is per se preposterous or absurd is not nat a matter for Court to consider. Appraisement of evidence by the arbitrator is ordinarily not a matter for the court. It is difficult to give an exact definition of the word `reasonable'. Reason varies in its conclusions according to the idiosyncrasy of the individual and the times and the circumstances in which he thinks. The word `reasonable' has in law prima facie meaning of reasonable in regard to those circumstances of which the actor, called upon to act reasonably, knows or ought to know. "

16. In AIR 1993 Delhi 78; M/s Narain Dass R. Israni Versus Union of India it was held that an arbitrator is not required to give a detailed judgment just like a Civil Court. What is expected of the arbitrator is simply this much that he must cull out the trend of his thought process. In 1999 (3) Arbitration Law Reports 310 (S.C.); Arosan Enterprises Limited Versus Union of India it was held that it is now a well settled principle of law that reappraisal of evidence by the Court is not permissible and as a matter of fact exercise of power by the Court to reappraise the evidence is unknown to a proceeding. In the event of there being no reasons in the award, question of interference of the Court would not arise at all. In the event, however, there are reasons, the interference would still be not available within the jurisdiction of the Court, unless of course, there exist a total perversity in the award or the

judgment is based on a wrong proposition of law. In the event, however, two views are possible on a question of law as well, the Court would not be justified in interfering with the award.

17. In the facts and circumstances there is no patent illegality or the award being so unfair and unreasonable that it will shock the conscience of the Court. The award does not seem to be opposed to the public policy and is not to be re-adjudicated in the facts and circumstances. There is no merit in the objections raised by the petitioner and the objections are not maintainable.

The petition is, therefore, dismissed.

November 13, 2007 **ANIL KUMAR, J.**
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